Part 121—Certification and Operations: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft

This change incorporates two amendments:

Amendment 121–249, Suspension of Pre-employment Alcohol Testing Requirement, adopted May 3, 1995. This final rule suspends the text in Appendix J, Sec. III, subsection A (''Pre-employment''). The preamble to this amendment starts on page P–1098.

Special Federal Aviation Regulation 38–11, Certification and Operating Requirements, adopted May 31, 1995, which extends the termination date of SFAR 38–2 to June 1, 1996.

Page Control Chart

Remove Pages	Dated	Insert Pages	Dated
P–1097 and P–1098	Ch. 11	P–1097 through P–1100	Ch. 12
Appendix J	Ch. 8	Appendix J	Ch. 12
S–52–1 through S–56–2	Ch. 10	S–52–1 through S–56–2	Ch. 12

Suggest filing this transmittal at the beginning of the FAR. It will provide a method for determining that all changes have been received as listed in the current edition of AC 00–44, Status of Federal Aviation Regulations, and a check for determining if the FAR contains the proper pages.

affected small entities.

The FAA has determined that approximately 35 air carriers operating under part 121 could be considered small entities. Based on the FAA's criteria and guidelines, a significant regulatory cost impact to these air carriers ranges from $4,300 for an unscheduled carrier to $61,600 for a scheduled carrier to $110,100 for scheduled carriers whose entire fleet has a seating capacity of more than 60. These values are annualized costs and are expressed in 1993 dollars. Typically, there are about 11 pilots per aircraft for carriers operating Group II airplanes and 6 pilots per aircraft for carriers operating Group I airplanes. Approximately half of these pilots act as PICs, while the other half act as SICs.

For a small scheduled carrier having a fleet seating capacity of more than 60 seats, owning 9 group II airplanes, and employing 99 pilots, the FAA estimates that 5 PICs would need 10 hours of additional transition operating experience at a cost of $6,350 (5 × 10 × $127/hr). Small entities will no longer be able to take advantage of reducing the required number of experience hours by exchanging one hour of supervised operating experience for one landing and takeoff. Thus, for the 5 PIC candidates, this will result in a cost of $1,600 (5 × 25 hours × 10% × $127/hr). Two PICs would not complete their consolidation within the 120-day period and require a supervised line observation flight by a check pilot at a cost of $248 (2 × 2 hours × $62/hr); one pilot would require refresher training at a cost of $381 (1 × 3 hours × $127). The costs of compliance to these carriers will be $8,600, which is less than the $110,100 threshold cost for a significant impact under the regulatory flexibility guidelines described above. Thus, the rule will not have a significant economic impact on a substantial number of these small entities.

Using the same methodology to estimate the cost for a small entity owning 9 turboprop airplanes and employing 54 pilots, 2 PICs would need 10 hours of additional transition operating experience at a cost of $1,100 (2 × 10 × $55/hr). These pilots would also not be able to reduce the number of hours of supervised operating experience at a cost of $275 (2 × 25 hours × 10% × $55/hr). One pilot would not complete consolidation of their learning within 120 days and require a line observation flight at a cost of $30 (1 × 2 hrs × $15), and 1 pilot needing refresher training at a cost of $165 (1 × 3 hrs × $55). The FAA estimates that the total cost to a small turboprop-owned air carrier will be $1,570 per year, which is less than the $61,600 threshold for a scheduled air carrier operating planes with less than 60 seats. Thus, the rule will not have a significant economic impact on a substantial number of these small entities.

Finally, a small entity owning 9 reciprocating engine airplanes and employing 54 pilots, 2 PICs would need 10 hours of additional transition operating experience at a cost of $1,100 (2 × 10 × $55/hr). These pilots would also not be able to reduce the number of hours of supervised operating experience at a cost of $275 (2 × 25 hours × 10% × $55/hr). One pilot would not complete consolidation of their learning within 120 days and require a line observation flight at a cost of $30 (1 × 2 hrs × $15), and 1 pilot needing refresher training at a cost of $165 (1 × 3 hrs × $55). The FAA estimates that the total cost to a small turboprop-owned air carrier will be $1,570 per year, which is less than the $4,300 for small unscheduled carriers. Thus, the rule will not have a significant economic impact on a substantial number of these small entities.

International Trade Impact

The final rule will have little impact on international trade. U.S. air carriers operating in international markets would incur some additional costs, primarily for supervised operating experience requirements, whereas foreign air carriers operating in the same markets will not be affected by the final rule. If the cost of the final rule (i.e., $33.4 million over the next 10 years) were borne entirely by U.S. carriers serving international markets, the cost would still represent a negligible amount of the international passenger revenues compared to the $280 billion forecast to be collected between 1993 and 2002.

that section states "Once a conversion course has been started a crew member shall not undertake flying duties on another type or variant until the course is completed or terminated."

Federalism Implications

The regulations herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this regulation will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation is a significant regulatory action under Executive Order 12866. In addition, the FAA certifies that this regulation will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This regulation is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). A final regulatory evaluation of the regulation, including a Regulatory Flexibility Determination and Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "FOR FURTHER INFORMATION CONTACT."

The Amendment

The Federal Aviation Administration amends part 121 of the Federal Aviation Regulations (14 CFR part 121) effective August 25, 1995.

The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. app. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g).

Amendment 121–249

Suspension of Pre-employment Alcohol Testing Requirement

Adopted: May 3, 1995 **Effective: May 10, 1995**

(Published in 60 FR 24765, May 10, 1995)

SUMMARY: The United States Court of Appeals for the Fourth Circuit recently issued a decision that vacated the pre-employment alcohol testing requirements of the Federal Highway Administration's alcohol testing rule. The Court remanded this provision to the agency for further proceedings consistent with its opinion. While the pre-employment alcohol testing requirements of the Federal Transit Administration, Federal Railroad Administration, and Federal Aviation Administration were not before the Court in the case, the rationale of the Court's decision applies to these requirements as well. For these reasons, the Department is suspending the pre-employment alcohol testing requirements of each of the four operating administrations until further notice.

FOR FURTHER INFORMATION CONTACT: For general questions, the Office of General Counsel (202) 366–9306. For questions regarding a specific operating administration, please call the following people: FTA—Judy Meade (202) 366–2896, FRA—Lamar Allen (202) 366–0127, FHWA—Office of Motor Carrier Research and Standards (202) 366–1790, FAA—Bill McAndrew (202) 366–6710.

Act's requirement of testing for alcohol use "in violation of law or Federal regulation" since alcohol consumption prior to a job application is generally not illegal.

- If the agency believes that "pre-employment" testing also means "pre-activity" testing, then it should require the driver to be tested before the performance of each safety-sensitive activity, not just his first.
- The agency's explanation to the court that "pre-activity" testing was permitted in order to reconcile the Act's pre-employment testing requirement with its reference to unlawful alcohol use was not supported by the rulemaking record.
- On remand, the agency should consider whether "pre-employment" could reasonably mean anything other than "pre-hire." The court noted that it likely did not. The agency should also determine whether Congress intended pre-employment alcohol testing to apply only to the small group of drivers for whom pre-hire alcohol use might be illegal and estimate how many job applicants will fall into this group.
- The court rejected ATA's alternative argument that FHWA had the statutory authority to waive all drivers from the pre-employment alcohol testing requirement and agreed with FHWA that such an all-encompassing waiver would effectively repeal the requirement and would thus be impermissibly broad.

This decision did not vacate the pre-employment alcohol testing regulations of the other modes, which were not before the court, but these regulations are based on parallel statutory language, and the rationale of the court's decision applies to them as well.

Because the Court's decision has vacated FHWA's pre-employment alcohol testing rule and created substantial uncertainty about the legal validity of the other operating administration's rules, the Department has decided to suspend all four pre-employment alcohol testing rules at this time. This suspension will be until further notice. Following its consideration of the issues involved on remand from the Court, the Department will decide what course of action to follow (e.g., withdrawal or amendment of the requirements, consistent with the Court's opinion). Such action would be taken through the rulemaking process.

As a result of this action, large employers regulated by FHWA are not required to do pre-employment alcohol testing. Employers regulated by FTA, FAA, and FRA who have begun testing are not required to continue pre-employment alcohol testing. Employers who are scheduled to begin pre-employment alcohol testing at a later date (e.g., January 1, 1996) will not be required to do so. Any employer may conduct pre-employment alcohol testing under its own authority. Because of the Court's decision and this suspension, employers who wish to continue such testing may not claim a basis in Federal law or regulation for doing so, however. We would also emphasize that this action applies only to pre-employment alcohol testing. Drug testing, and other types of alcohol tests, are not affected.

As announced by Secretary of Transportation Federico Peña before the Court's decision was issued, the Department is sending a proposed bill to Congress that would make pre-employment alcohol testing discretionary with employers. This legislation is based on the Administration's policy of eliminating regulations that are unnecessary or too costly and burdensome. It would clarify that employers are not required to conduct such testing, but have the option of doing so under the authority of Federal law.

Regulatory Process Matters

DOT Regulatory Policies and Procedures

The final rule is considered to be a nonsignificant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034. It also is a nonsignificant rule for purposes of Executive Order 12886. The Department estimated, at the time it issued its final alcohol testing rules in February 1994, that pre-employment alcohol testing in the four operating administrations would cost approximately $28 million

the Department does not have any discretion with respect to compliance with this decision, and because the Department must promptly resolve any legal uncertainty over the validity of pre-employment alcohol testing the decision has created, the Department finds that there is good cause to make this rule effective immediately. For the same reasons, the Department finds that prior notice and public comment would be impracticable, unnecessary, and contrary to the public interest.

For the reasons set out in the preamble, the Federal Aviation Administration amends 14 CFR part 121 effective May 10, 1995.

The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, and 1502 (revised Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

B. *Alcohol testing procedures.* Each employer shall ensure that all alcohol testing conducted pursuant to this appendix complies with the procedures set forth in 49 CFR part 40. The provisions of 49 CFR part 40 that address alcohol testing are made applicable to employers by this appendix.

C. *Definitions.*

As used in this appendix—

Accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury or in which the aircraft receives substantial damage.

Administrator means the Administrator of the Federal Aviation Administration or his or her designated representative.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this appendix.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmation test means a second test, following a screening test with a result 0.02 or greater, that provides quantitative data of alcohol concentration.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this appendix and that acts on behalf of such employers or contractors.

Covered employee means a person who performs, either directly or by contract, a safety-sensitive function listed in section II of this appendix for an employer (as defined below). For purposes of pre-employment testing only, the term "covered employee" includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.

Employer means a part 121 certificate holder; a part 135 certificate holder; an air traffic control facility not operated by the FAA or by or under contract to the U.S. military; and an operator as defined in 14 CFR 135.1(c).

Performing (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means a function listed in section II of this appendix.

Screening test means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Violation rate means the number of covered employees (as reported under section IV of this appendix) found during random tests given under this appendix to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random test required by this appendix, divided by the total reported number of employees in the industry given random alcohol tests under this appendix plus the total reported number of employees in the industry who refuse a random test required by this appendix.

D. *Preemption of State and local laws.*

1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

E. *Other requirements imposed by employers.*

Except as expressly provided in these alcohol misuse requirements, nothing in these requirements shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

F. *Requirement for notice.*

Before performing an alcohol test under this appendix, each employer shall notify a covered employee that the alcohol test is required by this appendix. No employer shall falsely represent that a test is administered under this appendix.

2. Flight attendant duties.

3. Flight instruction duties.

4. Aircraft dispatcher duties.

5. Aircraft maintenance or preventive maintenance duties.

6. Ground security coordinator duties.

7. Aviation screening duties.

8. Air traffic control duties.

III. Tests Required

A. [Suspended]

B. *Post-accident.*

1. As soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employer's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

2. (a) If a test required by this section is not administered within 2 hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

(b) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FAA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that are not completed within 8 hours shall be submitted to the FAA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997,

(iv) Reason(s) test could not be completed within 8 hours; and

(v) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

3. A covered employee who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

C. *Random testing.*

1. Except as provided in paragraphs 2–4 of this section, the minimum annual percentage rate for random alcohol testing will be 25 percent of the covered employees.

2. The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for this determination is drawn from alcohol MIS reports required by this appendix. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the *Federal Register* the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

3. (a) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this appendix for two consecutive less than 1.0 percent but equal to or greater than 0.5 percent.

4. (a) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of this appendix for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(b) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of this appendix for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

5. The selection of employees for random alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees who are subject to random alcohol testing at the same minimum annual percentage rate under this appendix or any DOT alcohol testing rule.

7. Each employer shall ensure that random alcohol tests conducted under this appendix are unannounced and that the dates for administering ran-

function and proceeds to the testing site as soon as possible.

9. A covered employee shall only be randomly tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

10. If a given covered employee is subject to random alcohol testing under the alcohol testing rules of more than one DOT agency, the employee shall be subject to random alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's functions.

11. If an employer is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the employer may—

(a) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(b) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

D. *Reasonable suspicion testing.*

1. An employer shall require a covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in §§ 65.46a, 121.458, or 135.253 of this chapter.

2. The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body-odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

3. Alcohol testing is authorized by this section only if the observations required by paragraph 2

4. (a) If a test required by this section is not administered within 2 hours following the determination made under paragraph 2 of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination made under paragraph 2 of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(b) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FAA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that are not completed within 8 hours shall be submitted to the FAA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Employee category (do *not* include employee name or other identifying information);

(iv) Reason(s) test could not be completed within 8 hours; and

(v) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

(c) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an employer permit the covered employee to perform or continue to perform safety-sensitive functions until:

135.253 of this chapter.

(d) Except as provided in paragraph 4(c), no employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

E. *Return to duty testing.*

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

F. *Follow-up testing.*

Following a determination under section VI, paragraph C.2 of this appendix that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of section VI, paragraph C.3(b)(2) of this appendix. A covered employee shall be tested under this paragraph only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

G. *Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than, 0.04.*

Each employer shall retest a covered employee to ensure compliance with the provisions of section V, paragraph F of this appendix, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

2. Period of Retention. Each employer shall maintain the records in accordance with the following schedule:

(a) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, records related to other violations of §§ 65.46a, 121.458, or 135.253 of this chapter, documentation of refusals to take required alcohol tests, calibration documentation, employee evaluations and referrals, and copies of any annual reports submitted to the FAA under this appendix shall be maintained for a minimum of 5 years.

(b) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of 2 years.

(c) *One year.* Records of all test results below 0.02 shall be maintained for a minimum of 1 year.

3. *Types of Records.* The following specific records shall be maintained.

(a) Records related to the collection process:

(1) Collection logbooks, if used.

(2) Documents relating to the random selection process.

(3) Calibration documentation for evidential breath testing devices.

(4) Documentation of breath alcohol technician training.

(5) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(6) Documents generated in connection with decisions on post-accident tests.

(7) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(b) Records related to test results:

(1) The employer's copy of the alcohol test form, including the results of the test;

(2) Documents related to the refusal of any covered employee to submit to an alcohol test required by this appendix.

(2) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(3) Records of notifications to the Federal Air Surgeon of violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.

(e) Records related to education and training:

(1) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(2) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.

(3) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(4) Certification that any training conducted under this appendix complies with the requirements for such training.

B. *Reporting of results in a management information system.*

1. Annual reports summarizing the result of alcohol misuse prevention programs shall be submitted to the FAA in the form and manner prescribed by the Administrator by March 15 of each year covering the previous calendar year (January 1 through December 31) in accordance with the provisions below.

(a) Each part 121 certificate holder shall submit an annual report each year.

(b) Each entity conducting an alcohol misuse prevention program under the provisions of this appendix, other than a part 121 certificate holder, that has 50 or more covered employees on January 1 of any calendar year shall submit an annual report to the FAA for that calendar year.

(c) The Administrator reserves the right to require employers not otherwise required to submit annual reports to prepare and submit such reports to the FAA. Employers that will be required to submit DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

3. Each employer shall ensure the accuracy and timeliness of each report submitted.

4. Each report shall be submitted in the form and manner prescribed by the Administrator.

5. Each report shall be signed by the employer's alcohol misuse prevention program manager or other designated representative.

6. Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements:

(a) Number of covered employees by employee category.

(b) Number of covered employees in each category subject to alcohol testing under the alcohol misuse rule of another DOT agency, identified by each agency.

(c)(1) Number of screening tests by type of test and employee category.

(2) Number of confirmation tests, by type of test and employee category.

(d) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04 by type of test and employee category.

(e) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(f) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.

(g) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).

violation.

(j) Number of covered employees who refused to submit to an alcohol test required under this appendix, the number of such refusals that were for random tests, and the action taken in response to each refusal.

(k) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

7. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may *only* be submitted if the program results meet these criteria.)

(a) Number of covered employees by employee category.

(b) Number of covered employees in each category subject to alcohol testing under the alcohol misuse rule of another DOT agency, identified by each agency.

(c) Number of screening tests by type of test and employee category.

(d) Number of covered employees who engaged in alcohol misuse who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).

(e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to each refusal.

(f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

8. An FAA-approved consortium may prepare reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness

request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall make available copies of all results of alcohol testing conducted under this appendix and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

4. When requested by the National Transportation Safety Board as part of an accident investigation, each employer shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

5. Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

6. An employer may disclose information required to be maintained under this appendix pertaining to a covered employee to the employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from the results of an alcohol test administered under this appendix or from the employer's determination that the employee engaged in conduct prohibited under §§ 65.46a, 121.458, or 135.253 of this chapter (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

7. An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only

Alcohol-Related Conduct

A. *Removal from safety-sensitive function.*

1. Except as provided in section VI of this appendix, no covered employee shall perform safety-sensitive functions if the employee has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter or an alcohol misuse rule of another DOT agency.

2. No employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.

B. *Permanent disqualification from service.*

An employee who violates §§ 65.46a(c), 121.458(c), or 135.253(c) of this chapter or who engages in alcohol use that violates another alcohol misuse provision of §§ 65.46a, 121.458, or 135.253 of this chapter and had previously engaged in alcohol use that violated the provisions of §§ 65.46a, 121.458, or 135.253 of this chapter after becoming subject to such prohibitions is permanently precluded from performing for an employer the safety-sensitive duties the employee performed before such violation.

C. *Notice to the Federal Air Surgeon.*

1. An employer who determines that a covered employee who holds an airman medical certificate issued under part 67 of this chapter has engaged in alcohol use that violated the alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter shall notify the Federal Air Surgeon within 2 working days.

2. Each such employer shall forward to the Federal Air Surgeon a copy of the report of any evaluation performed under the provisions of section VI of this appendix within 2 working days of the employer's receipt of the report.

3. All documents shall be sent to the Federal Air Surgeon, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590.

4. No covered employee who holds a part 67 airman medical certificate shall perform safety-sensitive duties for an employer following a violation until and unless the Federal Air Surgeon has received notification from the employee of his or her successful completion of rehabilitation. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN–460, P.O. Box 25082, Oklahoma City, OK 73125.

2. An employer is not required to notify the above office of refusals to submit to pre-employment alcohol tests or refusals to submit to return to duty tests.

E. *Required evaluation and testing.*

No covered employee who has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter shall perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. No employer shall permit a covered employee who has engaged in such conduct to perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix.

F. *Other alcohol-related conduct.*

1. No covered employee tested under the provisions of section III of this appendix who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, nor shall an employer permit the employee to perform or continue to perform safety-sensitive functions, until:

(a) The employee's alcohol concentration measures less than 0.02; or

(b) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following administration of the test.

2. Except as provided in subparagraph 1 of this paragraph, no employer shall take any action under this rule against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with law.

VI. Alcohol Misuse Information, Training, and Referral

A. *Employer obligation to promulgate a policy on the misuse of alcohol.*

prevention program and to each person subsequently hired for or transferred to a covered position.

(b) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

2. *Required content.* The materials to be made available to employees shall include detailed discussion of at least the following:

(a) The identity of the person designated by the employer to answer employee questions about the materials.

(b) The categories of employees who are subject to the provisions of these alcohol misuse requirements.

(c) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with these alcohol misuse requirements.

(d) Specific information concerning employee conduct that is prohibited by this chapter.

(e) The circumstances under which a covered employee will be tested for alcohol under this appendix.

(f) The procedures that will be used to test for the presence of alcohol, protect the employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(g) The requirement that a covered employee submit to alcohol tests administered in accordance with this appendix.

(h) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(i) The consequences for covered employees found to have violated the prohibitions in this chapter, including the requirement that the employee be removed immediately from performing safety-sensitive functions, and the procedures under section VI of this appendix.

(j) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(l) Optional provisions. The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the employer's authority independent of this appendix. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

B. *Training for supervisors.*

Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section II of this appendix receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

C. *Referral. evaluation, and treatment.*

1. Each covered employee who has engaged in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

2. Each covered employee who engages in conduct prohibited under §§ 65.46a, 121.458, or 135.253 of this chapter shall be evaluated by a substance abuse professional who must determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

3. (a) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine whether the employee

the first 12 months following the employee's return to duty. The employer may direct the employee to undergo testing for drugs (both return to duty and follow-up), in addition to alcohol testing, if the substance abuse professional determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

4. Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

5. Each employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(a) a public agency, such as a State, county, or municipality;

(b) the employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;

(c) the sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(d) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

A. *Schedule for submission of certification statements and implementation.*

1. Each employer shall submit an alcohol misuse prevention program (AMPP) certification statement as prescribed in paragraph B of section VII of this appendix, in duplicate, to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590, in accordance with the schedule below.

(a) Each employer that holds a part 121 certificate, each employer that holds a part 135 certificate and directly employs more than 50 covered employees, and each air traffic control facility affected by this rule shall submit a certification statement to the FAA by July 1, 1994. Each employer must implement an AMPP meeting the requirements of this appendix by January 1, 1995. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by July 1, 1995.

(b) Each employer that holds a part 135 certificate and directly employs from 11 to 50 covered employees shall submit a certification statement to the FAA by January 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix by July 1, 1995. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by January 1, 1996.

(c) Each employer that holds a part 135 certificate and directly employs ten or fewer covered employees, and each operator as defined in 14 CFR 135.1(c) shall submit a certification statement to the FAA by July 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix by January 1, 1996. Contractor employees to these employers must be subject to an AMPP meeting the requirements of this appendix by July 1, 1996.

2. A company providing covered employees by contract to employers may be authorized by the FAA to establish an AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each

that the employee is subject to the contractor company's FAA-mandated AMPP.

3. A consortium may be authorized to establish a consortium AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each consortium that so certifies shall implement the AMPP on behalf of the consortium members in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization in the case of any consortium that fails to properly implement the AMPP.

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with the provisions of these alcohol misuse requirements and must maintain all records required under section IV of this appendix.

(c) Each consortium shall notify the FAA of any membership termination within 10 days of such termination.

4. Any person who applies for a certificate under the provisions of part 121 or 135 of this chapter after the effective date of the final rule shall submit an alcohol misuse prevention program (AMPP) certification statement to the FAA prior to beginning operations pursuant to the certificate. The AMPP shall be implemented concurrently with beginning such operations or by the date specified in paragraph A.l. of this section, whichever is later. Contractor employees to a new certificate holder must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

5. Any person who intends to begin air traffic control operations as an employer as defined in 14 CFR 65.46(a)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after March 17, 1994, shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or by the date specified in paragraph A.l of this section, whichever is later. Contractor employees to a new operator must be subject to an FAA-mandated AMPP within 180 days of the implementation of the employer's AMPP.

7. The duplicate certification statement shall be annotated indicating receipt by the FAA and returned to the employer, contractor company, or consortium.

8. Each consortium that submits an AMPP certification statement to the FAA must receive actual notice of the FAA's receipt of the statement prior to performing services as an FAA-approved consortium under this appendix on behalf of employers or contractor companies.

9. Each employer, and each contractor company that submits a certification statement directly to the FAA, shall notify the FAA of any proposed change in status (*e.g.,* join a consortium or another carrier's program, change consortium, etc.) prior to the effective date of such change. The employer or contractor company must ensure that it is continuously covered by an FAA-mandated alcohol misuse prevention program.

B. *Required content of AMPP certification statements.*

1. Each AMPP certification statement submitted by an employer or a contractor company shall provide the following information:

(a) the name, address, and telephone number of the employer/contractor company and for the employer/contractor company AMPP manager;

(b) FAA operating certificate number (if applicable);

(c) the date on which the employer or contractor company will implement its AMPP;

(d) if the submitter is a consortium member, the identity of the consortium; and

(e) a statement signed by an authorized representative of the employer or contractor company certifying an understanding of and agreement to comply

(c) a statement signed by an authorized representative of the consortium certifying an understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

VIII. Employees Located Outside the U.S.

A. No covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

sitive functions wholly or partially within the territory of the United States.

B. The provisions of this appendix shall not apply to any person who performs a safety-sensitive function by contract for an employer outside the territory of the United States.

(Amdt. 121–237, Eff. 3/17/94); (Amdt. 121–237*, Eff. 10/21/94); (Amdt. 121–245, Eff. 1/1/95); [(Amdt. 121–249, Eff. 5/10/95)]

SUMMARY: This amendment establishes a new termination date for Special Federal Aviation Regulation [SFAR] No. 38–2 [50 FR 23941; June 7, 1985], which contains the certification and operating requirements for persons transporting passengers or cargo for compensation or hire. The current termination date for SFAR 38–2 is June 1, 1995. Because the FAA has not completed a rulemaking process to consolidate and codify the certification and operations specifications requirements, an extension of the termination date is necessary. If this rulemaking process is completed before the new termination date of June 1, 1996, the FAA intends to rescind SFAR 38–2 as part of that rulemaking.

DATES: Effective date June 1, 1995. Comments must be received on or before August 1, 1995.

ADDRESSES: Send comments on the rule in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–10), Docket No. 18510, 800 Independence Avenue, SW., Washington, DC 20591, or deliver comments in triplicate to: Federal Aviation Administration, Rules Docket, Room 916, 800 Independence Avenue, SW., Washington, DC. Comments may be examined in the Rule Dockets weekdays, except Federal holidays, between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Gary Davis, Project Development Branch (AFS–240), Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–8096.

SUPPLEMENTARY INFORMATION:

Background

On December 12, 1978, the FAA issued SFAR 38 [43 FR 58366; December 14, 1978] as a consequence of the Airline Deregulation Act of 1978 (ADA or Act) (Pub. L. 95–504, 92 Stat. 1705). That Act expresses the Congressional intent that the Federal Government diminish its involvement in regulating the economic aspects of the airline industry. To accomplish this, Congress directed that the Civil Aeronautics Board (CAB) be abolished on December 31, 1984, and that certain of its functions cease before that date. Anticipating its sunset, the CAB itself curtailed or suspended much of its regulatory activity during the period 1979–1984. By January 1, 1985, the remaining CAB functions were transferred to the Department of Transportation (DOT).

Because some aspects of FAA safety regulations relied upon CAB definitions and authority, the FAA found it necessary in 1978 to adopt an interim measure to provide for an orderly transition to the change in economic regulatory activities. This action was consistent with the Congressional directive contained in Section 107(a) of the Act that the deregulation of airline economics result in no diminution of the high standard of safety in air transportation that existed when the ADA was enacted. SFAR 38 [43 FR 58366; December 14, 1978] set forth FAA certification and operating requirements applicable to all ''air commerce'' and ''air transportation'' operations for ''compensation or hire.'' (SFAR 38 did not address Part 133—External Load Operations, Part 137—Agriculture Aircraft Operations, or Part 91—Training and Other Special Purpose Operations.)

tained, and each air carrier typically was authorized to conduct only one type of operation (domestic, flag, or charter (e.g., supplemental)). The safety certificate issued to the air carrier by the FAA paralleled the authorization granted in the air carrier's economic certificate. Economic deregulation broke down the barriers between the various types of operations. The economic authority granted an air carrier by the DOT is no longer indicative of the safety regulations applicable to the type of operation authorized by the FAA. Thus, it was necessary for the FAA to establish guidelines to determine what safety standards were applicable to an operator's particular operation.

Since that time, the FAA has proposed rulemaking to codify the certification and operations specifications requirements currently found in SFAR 38–2 into a new part 119 [Notice No. 88–16] [53 FR 39852; October 12, 1988].

On April 11, 1990, the FAA reopened the comment period for Notice No. 88–16 [55 FR 14404; April 17, 1990] for comments on the definition of ''scheduled operation'' and the notification requirement for changes to operations specifications for a period of 30 days. The reopened comment period closed May 17, 1990. Based on the complexity of comments received, the FAA subsequently published an SNPRM on June 8, 1993 [58 FR 32248]; the comment period closed July 23, 1993.

Recently the FAA issued a notice proposing that many part 121 requirements should be imposed on certain part 135 operators [60 FR 16230; March 29, 1995]. If that proposal is adopted, the rules specifying the applicability of parts 121, 125, and 135 would be codified in a new part 119. In that same NPRM, the FAA proposed to rescind SFAR 38–2 if a final rule affecting commuter operators and establishing a new part 119 is issued. However, in the meantime, SFAR 38–2 contains the current requirements for certification and operations specifications. Thus, the FAA finds it necessary to extend the SFAR until June 1, 1996.

Good Cause Justification for Immediate Adoption

The reasons which justify the adoption, and the subsequent revision, of SFAR 38 still exist. Therefore, it is in the public interest to establish a new termination date for SFAR 38–2 of June 1, 1996. If the FAA publishes a final rule adopting a new part 119 into the Federal Aviation Regulations before the termination date, that rulemaking will rescind SFAR 38–2. This action is necessary to permit continued operations under SFAR 38–2 and to avoid confusion in the administration of FAA regulations regarding operating certificates and operating requirements.

For this reason, and because this amendment continues in effect the provisions of a currently effective SFAR and imposes no additional burden on any person, I find that notice and public procedures are unnecessary, impracticable, and contrary to the public interest, and that the amendment should be made effective in less than 30 days after publication. However, interested persons are invited to submit such comments as they desire regarding this amendment. Communications should identify the docket number and be submitted in duplicate to the address above. All communications received on or before the close of the comment period will be considered by the Administrator, and this amendment may be changed in light of the comments received. All comments will be available, both before and after the closing date for comments, in the rules docket for examination by interested parties.

International Trade Impact Analysis

The FAA finds this amendment will have no impact on international trade.

Paperwork Reduction Act

Information collection requirements in this SFAR have previously been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB Control Number 2120–0008.

Federalism Implications

The amendment herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this amendment would not have sufficient federalism applications to warrant the preparation of a Federalism Assessment.

Conclusion

The FAA has determined that this document involves an amendment that imposes no additional burden on any person. Accordingly, it has been determined that this action is not significant under Executive Order 12866; it is not significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and the anticipated impact is so minimal that a full regulatory evaluation is not required.

Adoption of the Amendment

In consideration of the foregoing SFAR 38–2 (14 CFR parts 121, 125, 127, 129, and 135) of the Federal Aviation Regulations is amended effective June 1, 1995.

The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40101, 40105, 40113, 44701–44702, and 44704–44705.

(a)(1) Certificates.

(a)(2) Certification requirements.

(a)(3) Operating requirements.

(b) Operations conducted under more than one paragraph.

(c) Prohibition against operating without certificate or in violation of operations specifications.

2. Certificates and foreign air carrier operations specifications.

(a) Air Carrier Operating Certificate.

(b) Operating Certificate.

(c) Foreign air carrier operations specifications.

3. Operations specifications.

4. Air carriers and those commercial operators engaged in scheduled intrastate common carriage.

(a)(1) Airplanes, more than 30 seats/7,500 pounds payload, scheduled within 48 States.

(a)(2) Airplanes, more than 30 seats/7,500 pounds payload, scheduled outside 48 States.

(a)(3) Airplanes, more than 30 seats/7,500 pounds payload, not scheduled and all cargo.

(b) Airplanes, 30 seats or less/7,500 or less pounds payload.

(c) Rotorcraft, 30 seats or less/7,500 pounds or less payload.

(d) Rotorcraft, more than 30 seats/more than 7,500 pounds payload.

5. Operations conducted by a person who is not engaged in air carrier operations, but is engaged in passenger operations, cargo operations, or both, as a commercial operator.

(a) Airplanes, 20 or more seats/6,000 or more pounds payload.

(b) Airplanes, less than 20 seats/less than 6,000 pounds payload.

(c) Rotorcraft, 30 seats or less/7,500 pounds or less payload.

(d) Rotorcraft, more than 30 seats/more than 7,500 pounds payload.

6. Definitions.

(a) Terms in FAR.

(1) Domestic/flag/supplemental/commuter.

(2) ATCO.

(b) FAR references to:

(1) Domestic air carriers.

(3) Foreign air carrier.

(4) Scheduled operations.

(5) Size of aircraft.

(6) Maximum payload capacity.

(7) Empty weight.

(8) Maximum zero fuel weight.

(9) Justifiable aircraft equipment.

(1) The types of operating certificates issued by the Federal Aviation Administration;

(2) The certification requirements an operator must meet in order to obtain and hold operations specifications for each type of operation conducted and each class and size of aircraft operated; and

(3) The operating requirements an operator must meet in conducting each type of operation and in operating each class and size of aircraft authorized in its operations specifications.

A person shall be issued only one certificate and all operations shall be conducted under that certificate, regardless of the type of operation or the class or size of aircraft operated. A person holding an air carrier operating certificate may not conduct any operations under the rules of part 125.

(b) Persons conducting operations under more than one paragraph of this SFAR shall meet the certification requirements specified in each paragraph and shall conduct operations in compliance with the requirements of the Federal Action Regulations specified in each paragraph for the operation conducted under that paragraph.

(c) Except as provided under this SFAR, no person may operate as an air carrier or as a commercial operator without, or in violation of, a certificate and operations specifications issued under this SFAR.

2. *Certificates and foreign air carrier operations specifications.*

(a) Persons authorized to conduct operations as an air carrier will be issued an Air Carrier Operating Certificate.

(b) Persons who are not authorized to conduct air carrier operations, but who are authorized to conduct passenger, cargo, or both, operations as a commercial operator will be issued an Operating Certificate.

(c) FAA certificates are not issued to foreign air carriers. Persons authorized to conduct operations in the United States as a foreign air carrier who hold a permit issued under Section 402 of the Federal Action Act of 1958, as amended (49 U.S.C. 1372), or other appropriate economic or exemption authority issued by the appropriate agency of the United States of America will be issued operations specifications in accordance with the requirements of part 129 and shall conduct their operations within the United States in accordance with those requirements.

3. *Operations specifications.*

The operations specifications associated with a certificate issued under paragraph 2(a) or (b) and the operations specifications issued under paragraph 2(c) of this SFAR will prescribe the authorizations, limitations and certain procedures under which each type of operation shall be conducted and each class and size of aircraft shall be operated.

4. *Air carriers, and those commercial operators engaged in scheduled intrastate common carriage.*

Each person who conducts operations as an air carrier or as a commercial operator engaged in scheduled intrastate common carriage of persons or property for compensation or hire in air commerce with—

(2) Scheduled operations to points outside the 48 contiguous states of the United States and the District of Columbia with those airplanes in accordance with the requirements of part 121 applicable to flag air carriers, and shall be issued operations specifications for those operations in accordance with those requirements.

(3) All-cargo operations and operations that are not scheduled with those airplanes in accordance with the requirements of part 121 applicable to supplemental air carriers, and shall be issued operations specifications for those operations in accordance with those requirements; except the Administrator may authorize those operations to be conducted under paragraph (4)(a)(1) or (2) of this paragraph.

(b) Airplanes having a maximum passenger seating configuration of 30 seats or less, excluding any required crewmember seat, and a maximum payload capacity of 7,500 pounds or less, shall comply with the certification requirements in part 135, and conduct its operations with those airplanes in accordance with the requirements of part 135, and shall be issued operations specifications for those operations in accordance with those requirements; except that the Administrator may authorize a person conducting operations in transport category airplanes to conduct those operations in accordance with the requirements of paragraph 4(a) of this paragraph.

(c) Rotorcraft having a maximum passenger seating configuration of 30 seats or less and a maximum payload capacity of 7,500 pounds or less shall comply with the certification requirements in part 135, and conduct its operations with those aircraft in accordance with the requirements of part 135, and shall be issued operations specifications for those operations in accordance with those requirements.

(d) Rotorcraft having a passenger seating configuration of more than 30 seats or a payload capacity of more than 7,500 pounds shall comply with the certification requirements in part 135, and conduct its operations with those aircraft in accordance with the requirements of part 135, and shall be issued special operations specifications for those operations in accordance with those requirements and this SFAR.

5. *Operations conducted by a person who is not engaged in air carrier operations, but is engaged in passenger operations, cargo operations, or both, as a commercial operator.*

Each person, other than a person conducting operations under paragraph 2(c) or 4 of this SFAR, who conducts operations with—

(a) Airplanes having a passenger seating configuration of 20 or more, excluding any required crewmember seat, or a maximum payload capacity of 6,000 pounds or more, shall comply with the certification requirements in part 125, and conduct its operations with those airplanes in accordance with the requirements of part 125, and shall be issued operations specifications in accordance with those requirements, or shall comply with an appropriate deviation authority.

(b) Airplanes having a maximum passenger seating configuration of less than 20 seats, excluding any required crewmember seat, and a maximum payload capacity of less than 6,000 pounds shall comply with the certification requirements in part 135, and conduct its operations in those airplanes in accordance with the requirements of part 135, and shall be issued operations specifications in accordance with those requirements.

with those requirements and this SFAR.]

6. *Definitions.*

(a) Wherever in the Federal Aviation Regulations the terms—

(1) ''Domestic air carrier operating certificate,'' ''flag air carrier operating certificate,'' ''supplemental air carrier operating certificate,'' or ''commuter air carrier (in the context of Air Carrier Operating Certificate) appears, it shall be deemed to mean an ''Air Carrier Operating Certificate'' issued and maintained under this SFAR.

(2) ''ATCO operating certificate'' appears, it shall be deemed to mean either an ''Air Carrier Operating Certificate'' or ''Operating Certificate,'' as is appropriate to the context of the regulation. All other references to an operating certificate shall be deemed to mean an ''Operating Certificate'' issued under this SFAR unless the context indicates the reference is to an Air Carrier Operating Certificate.

(b) Wherever in the Federal Aviation Regulations a regulation applies to—

(1) ''Domestic air carriers,'' it will be deemed to mean a regulation that applies to scheduled operations solely within the 48 contiguous states of the United States and the District of Columbia conducted by persons described in paragraph 4(a)(1) of this SFAR.

(2) ''Flag air carriers,'' it will be deemed to mean a regulation that applies to scheduled operations to any point outside the 48 contiguous states of the United States and the District of Columbia conducted by persons described in paragraph 4(a)(2) of this SFAR.

(3) ''Supplemental air carriers,'' it will be deemed to mean a regulation that applies to charter and all-cargo operations conducted by persons described in paragraph 4(a)(3) of this SFAR.

(4) ''Commuter air carriers,'' it will be deemed to mean a regulation that applies to scheduled passenger carrying operations, with a frequency of operations of at least five round trips per week on at least one route between two or more points according to the published flight schedules, conducted by persons described in paragraph 4(b) or (c) of this SFAR. This definition does not apply to part 93 of this chapter.

(c) For the purpose of this SFAR, the term—

(1) ''Air carrier'' means a person who meets the definition of an air carrier as defined in the Federal Aviation Act of 1958, as amended.

(2) ''Commercial operator'' means a person, other than an air carrier, who conducts operations in air commerce carrying persons or property for compensation or hire.

(3) ''Foreign air carrier'' means any person other than a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(4) ''Scheduled operations'' means operations that are conducted in accordance with a published schedule for passenger operations which includes dates or times (or both) that is openly advertised or otherwise made readily available to the general public.

(5) ''Size of aircraft'' means an aircraft's size as determined by its seating configuration or payload capacity, or both.

of minimum fuel load, oil, and flightcrew). The allowance for the weight of the crew, oil, and fuel is as follows:

(A) Crew—200 pounds for each crewmember required by the Federal Aviation Regulations.

(B) Oil—350 pounds.

(C) Fuel—the minimum weight of fuel required by the applicable Federal Aviation Regulations for a flight between domestic points 174 nautical miles apart under VFR weather conditions that does not involve extended overwater operations.

(7) ''Empty weight'' means the weight of the airframe, engines, propellers, rotors, and fixed equipment. Empty weight excludes the weight of the crew and payload, but includes the weight of all fixed ballast, unusable fuel supply, undrainable oil, total quantity of engine coolant, and total quantity of hydraulic fluid.

(8) ''Maximum zero fuel weight'' means the maximum permissible weight of an aircraft with no disposable fuel or oil. The zero fuel weight figure may be found in either the aircraft type certificate data sheet, or the approved Aircraft Flight Manual, or both.

(9) ''Justifiable aircraft equipment'' means any equipment necessary for the operation of the aircraft. It does not include equipment or ballast specifically installed, permanently or otherwise, for the purpose of altering the empty weight of an aircraft to meet the maximum payload capacity.

This Special Federal Aviation Regulation No. 38–2 terminates [June 1, 1996], or the effective date of the codification of SFAR 38–2 into the Federal Aviation Regulations, whichever occurs first.

★ U.S. GOVERNMENT PRINTING OFFICE: 1995 – 387 - 539 / 20021